U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 2 5 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director) denied the employment-based immigrant visa petition, and the petitioner appealed that decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a healthcare contractor. It seeks to employ the beneficiary permanently in the United States as a registered nurse, clinical case manager, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."[1] The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the petitioner filed the I-140 petition on June 22, 2012.

On December 5, 2012, the director denied the petition because the petitioner failed to demonstrate that on the priority date, the beneficiary possessed the required experience as set forth on the labor certification. On appeal, counsel states that "harmless error" was made on the Form ETA 9089 and requests leave to amend the Form ETA 9089. The petitioner submits a copy of its notice of filing to show that its intent is to accept a master's degree in nursing in lieu of combination of education and experience.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[1] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2). Here, the record contains a copy of the beneficiary's registered nurse license issued by the State of on October 20, 2009.

The petitioner also must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." (Emphasis added). *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984).

On the ETA Form 9089, the "job offer" position description for Clinical Case Manager RN the petitioner states, "[d]evelopment of the plan of care" and attaches a position description. Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: "Bachelor's"

H.4-B. Major Field Study: "Nursing"

H.6. Is experience in the job offered required for the job?

The petitioner checked "yes."

H.6A. If yes, number of months experience required?

The petitioner indicated "60."

H.7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

H.8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

H.8.A. If yes, specify the alternate level of education required:

The petitioner left this section blank.

H.8.C. If applicable, indicate the number of years experience acceptable in question 8:

The petitioner left this section blank.

H.9. Is a foreign educational equivalent acceptable?

The petitioner checked "yes" that a foreign educational equivalent would be accepted.

H.10. Is experience in an alternative occupation acceptable?

The petitioner checked "no" to this question.

In support of the beneficiary's work experience, the petitioner indicated on the labor certification that the beneficiary has been employed by the [redacted] in [redacted] from November 2011 to the present (the day the beneficiary signed the labor certification), and was employed by [redacted] from November 2009 to June 2010.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record does not contain any documentation in support of the beneficiary's claimed experience.

In the October 22, 2012 notice of intent to dismiss, the director informed the petitioner that it failed to demonstrate that the beneficiary has the required 60 months of experience as indicated on the labor certification. In response, the petitioner submitted a copy of the beneficiary's Master of Science Degree in Nursing from the [redacted] that the beneficiary obtained in May 2012 and a copy of the Notice of Filing to demonstrate that the petitioner's intent was to accept a "Master's Degree" or "BSN" (Bachelor of Science in Nursing) degree with five years of experience. Counsel cites 8 C.F.R. § 204.5(k)(4)(i), which states in part that a "Schedule A application must demonstrate that job requires a professional holding an advanced degree."

Counsel also cites 8 C.F.R. § 204.5(k)(2), which states in part that an advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. The regulation further states: "A United States baccalaureate degree or a foreign

equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.* Counsel asserts, "the position requires and the beneficiary holds the higher qualifying requirement of a U.S. Master's degree in nursing, and the BSN plus five years requirement is therefore not applicable."

In his December 5, 2012 decision, the director noted that he could not ignore the terms of the labor certification and if the petitioner would accept a master's degree in lieu of a bachelor's degree and 60 months of experience, it should have indicated that on the labor certification. The director concluded that the beneficiary did not have the minimum 60 months of experience in the job offered as set forth on the labor certification and denied the petition accordingly.

On appeal, counsel asserts that the petitioner has made "harmless error" on the labor certification and now would like to amend the labor certification to state "yes" to question H.8; "Master's" to question H.8.A; and "0" (zero) to question H.8.C to show that it would accept a master's degree and no experience in lieu of a bachelor of science degree in nursing and 60 months of experience. We note that a petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). *See also Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988) (A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements.). There is no evidence in the record that the director committed reversible error, nor does the petitioner make any assertions on appeal that the director's decision contains any errors in law or fact.

Where the director determines that the terms of the labor certification were unambiguous and the petitioner has not established a beneficiary's eligibility at the time of filing of the petition, the director need not inquire as to whether the petitioner might have intended to accept an alternate qualification. The AAO cannot conclude that the director committed reversible error by adjudicating the petition according to the unambiguous terms set forth on the labor certification by the petitioner. The record does not demonstrate that on the priority date, the beneficiary possessed the required 60 months of experience. Therefore, the petitioner has failed to demonstrate that on the priority date, the beneficiary met the minimum requirements set forth on the labor certification.

Beyond the director's decision, the AAO also concludes that the petitioner's notice of the filing of an ETA Form 9089 (Notice) does not comply with the regulations. Petitions for Schedule A occupations must contain evidence establishing that the employer provided its U.S. workers with Notice as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative,

by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

(i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
(iii) Provide the address of the appropriate Certifying Officer; and
(iv) Be provided between 30 and 180 days before filing the application.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

In the instant case, the Notice provides a web link, in lieu of the Certifying Officer's address.[3] Therefore, the Notice does not meet the requirements set forth in the regulation. Furthermore, the petitioner is a contractor and the Notice does not indicate whether the Notice was posted at the petitioner's place of business or at the worksite where the beneficiary would perform her duties.[4]

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[3] On or after June 1, 2008, the address must be listed on the posting notice is: The Department of Labor, Employment and Training Administration, Atlanta National Processing Center, Harris Tower, 233 Peachtree Street, Suite 410 Atlanta, Georgia 30303.

[4] The DOL's FAQ #12 states, "If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located. If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the

In addition, the AAO concludes that the petitioner has failed to demonstrate that it has the continuing ability to pay the proffered wage on the priority date and onward. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on June 22, 2012, the priority date, which is the date the petition was accepted for processing by USCIS. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 9089 is $44 per hour, or $91,520 per year.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In support of its ability to pay the proffered wage, the petitioner submits the 2010 corporate tax return for and a one-page 2009 Internal Revenue Service Form 1120S for The petitioner also submits the consolidated financial statements for and its subsidiaries for 2007-2010. In addition, the petitioner includes an organizational diagram showing the divisions of Further, the petitioner submits a letter, dated June 14, 2012, from the president of the petitioner, states that the petitioner has been in continuous operation since 1993 and its gross revenues are in excess of $17 million annually. This letter is on company letterhead and includes a statement "A Division of " The AAO notes that the petitioner has not submitted an official document, such as articles of incorporation, or annual reports that show the petitioner as the subsidiary of The consolidated financial statements, although titled " and Subsidiaries," they do not identify the subsidiaries of Furthermore, we

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occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters. If the work-site(s) is unknown and the staffing agency has no clients, the application would be denied based on the fact that this circumstance indicates no bona-fide job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application." *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile12 (last accessed on June 21, 2013).

find the diagram showing divisions and the statement on the letterhead insufficient to establish the petitioner's subsidiary status and its financial ties to . The petitioner has failed to submit its own annual reports, federal tax returns, or audited financial statements as set forth in the regulation and has failed to demonstrate that it is a subsidiary of . Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the AAO concludes that the petitioner has failed to demonstrate that it has the continuing ability to pay the proffered wage as of the priority date onward.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.